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INTRODUCTION

James Fanto, Lawrence Solan, and John Darley build their article, *Justifying Board Diversity*,[1] on the basis of two essential claims—one legal, the other empirical. The legal claim is that existing law does not much constrain how corporate boards address the (lack of) diversity of their membership.[2] The empirical claim is that board diversity doesn't increase shareholder value.[3] Based on these two claims, Fanto et al. criticize "diversity advocates" for making the fundamental mistake of justifying increased board diversity on the grounds of increasing shareholder value. What's worse, this strategy does not reflect diversity advocates' true values, which are about social justice, not financial self-interest. This is what I call their *mismatch critique.*

The legal and empirical claims are unobjectionable, and for purposes of this Commentary, I will assume that they are correct. However, the mismatch critique warrants careful unpacking. The

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1. James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 901 (2011).

2. *See id.* at 920–28.

3. *See id.* at 917–20.

strength of this critique turns on whether diversity advocates had or have better options realistically available to them. The authors make modest attempts to suggest a few, but none is systematically defended. In the end, their alternative suggestions are implausible or underspecified, which undermines the force of their mismatch critique.

I. TWO CLAIMS AND A CRITIQUE

Legal claim. Fanto et al. point out that for all practical purposes, corporate boards have great flexibility on whether to take proactive action to increase racial and gender diversity within their ranks.[4] On the one hand, they can choose to do nothing at all and leave their membership predominantly white and male.[5] Constitutional law—e.g., the federal Equal Protection Clause—has no say because corporations are not state actors. Title VII has no say because board members are not "employees" within the meaning of the statute.[6] On the other hand, boards can opt to take proactive action. Corporate law doesn't constrain them much, given the large error bars placed around board decision making courtesy of the business judgment rule, even if short-term profits are arguably sacrificed.[7] Moreover, as already discussed, equality law under the Constitution and Title VII doesn't apply. So, angry white males don't have a legal leg to stand on either.

Given this legal flexibility, diversity advocates have pushed their agenda of increasing board diversity. But they have not done so through fiery recollections of the 1960s civil rights movement; instead, they have opted for the rhetoric of corporate self-interest ("the business case for diversity"), as measured by shareholder value.[8]

Empirical claim. Unfortunately, this tactic runs smack into inconvenient facts. As Fanto et al. summarize, there is no empirical demonstration that board diversity actually improves shareholder value.[9] As they point out, such evidence would be startling because the structure of boards generally has been found to be irrelevant to shareholder value.[10]

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4. *See id.* at 918–19.

5. *See id.* at 926.

6. *See id.* at 920. The authors add that even if Title VII did apply, disparate treatment and impact cases would be difficult to win. *See id.* at 926.

7. *See id.* at 918–19.

8. *See id.* at 917.

9. *See id.*

10. *See id.* at 918.

This leaves diversity advocates in a pickle, caused by the empirical fragility of their argument. Their case is built on an empirical assumption that cannot be demonstrated. So they lose. Further, Fanto et al. seem to blame diversity advocates for taking this path.[11] They suggest that diversity advocates should have done something else, more consistent with their true values and motivations grounded in social justice.[12] To repeat, this is their *mismatch critique.*

II. UNPACKING THE MISMATCH CRITIQUE

A. The "Mismatch"

According to Fanto et al., diversity advocates are driven by "X" but deploy an unrelated set of arguments, "Y." The authors are clear about what "Y" is: the business case for diversity, as measured by shareholder value.[13] They are somewhat less clear about what "X" is, but it has something to do with social justice. The most direct statement is here:

> We believe that the advocates' concern about board diversity is primarily motivated by ... social values that undergird the Civil Rights Act. This motivation would seemingly render the arguments about the business advantage of diverse boards irrelevant. For if those who support diversifying corporate boards do so because they believe diversity to be a worthy value in its own right, then the arguments about whether diversification enriches shareholders would seem to be a necessary intellectual justification, but not one of significant concern.[14]

Although somewhat vague, the "social values" of the Civil Rights Act probably appeal to the ideals of corrective justice, distributive justice, and antidiscrimination. In any event, the authors' point is that diversity advocates don't really care about corporate self-interest.

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11. *See id.* at 904.

12. *See id.* at 904–05.

13. *See, e.g., id.* at 917 ("[P]roponents of board diversity often feel obligated to justify it on the basis of shareholder value.").

14. *Id.* at 921. It seems odd to focus so much on the Civil Rights Act when there are other sources of equality-related values, such as the Equal Protection Clause. Moreover, I'm doubtful that including board memberships formally in the purview of Title VII would satisfy diversity advocates because, as Fanto et al. themselves point out, winning a Title VII case would be ridiculously hard.

Thus, we have a mismatch. Diversity advocates are driven by social justice ("X") but talk instead only of corporate self-interest ("Y").

B. The "Critique"

Fanto et al. don't explicitly argue that mismatch is intrinsically problematic—in terms of, say, insincerity and artifice. Instead, their critique seems to be that diversity advocates bet on the wrong horse ("shareholder value").[15] Put in more strident terms than the authors deploy, diversity advocates "sold out"[16] by embracing the business case for diversity, and now the chickens are coming home to roost. To mix one last metaphor, diversity advocates made their bed (no doubt with nice, corporate-embroidered duvet covers), and they now have to lie in it.

The force of this critique depends largely on whether diversity advocates could have done otherwise. Assuming that they were indeed driven by various "justice" goals and motivations, could they have offered a different rhetorical strategy and/or substantive justifications that would have worked better and were less empirically fragile? Fanto et al. say that diversity advocates "may not want to pin all of their hopes"[17] on one set of empirical results.[18] But if no better option was and is on the table, then the criticism seems quixotic. So, what are the alternative options? What are the other "justifications and normative frameworks ... to support diverse boards"[19] that Fanto et al. suggest?

C. The Alternatives?

1. Fighting Groupthink?

Fanto et al. chafe at how finance theory has colonized corporate law, governance, and policymaking.[20] Rejecting this orientation, they

15. *See id.* at 904–05.

16. One is reminded of Audre Lorde's observation: "[T]he master's tools will never dismantle the master's house." AUDRE LORDE, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 110, 112 (1984). The point is eloquently made, but I think it's a substantial exaggeration. Tools designed for one purpose often can be used for contrary ends.

17. Fanto et al., *supra* note 1, at 902.

18. *See id.* at 904 ("We argue that diversity advocates should embrace justifications and normative frameworks other than shareholder value to support diverse boards."); *id.* at 919 ("Why, then, cannot diversity advocates be content with winning the diversity war without winning the empirical battle?").

19. *Id.* at 904.

20. *See id.* at 904–05.

argue that even if shareholder value can't be demonstrated, perhaps board diversity could be justified on the grounds of improved decision making, especially in pathological cases.[21] In particular, they suggest that greater diversity could decrease "groupthink"[22] (even if such decreases could not be picked up in shareholder value regression).

But almost immediately, Fanto et al. point out that as an empirical matter, it's heroic to assume that increased board diversity of the sort we are likely to see would have much impact on groupthink.[23] First, there is a selection bias. The only kinds of women and minorities that would be let onto boards would have been vetted so as not to rock the boat too much.[24] Second, a critical mass is necessary to change deliberative dynamics, not just one or two "outsider" board members.[25] As The Who put it succinctly: "Meet the new boss, same as the old boss."[26] In the end, the groupthink justification also falls prey to its empirical fragility and cannot be easily proven.[27]

In addition, this kind of justification—even if empirically demonstrable—would not ameliorate the "mismatch" part of the mismatch critique. Improving board decision making, for example, to check excessive manager compensation, is still fundamentally about promoting corporate self-interest and not about social justice.

2. Social Justice?

So, what realistic option do the authors prefer? To repeat, it can't be about shareholder value, grounded in finance theory. That only "belittles or cheapens the case for board diversity."[28] It's hard to pinpoint concrete alternatives, but the authors do repeatedly refer to other "normative frameworks." One example they offer is "to redress past discrimination."[29] They also recommend "signaling effect,"[30]

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21. *See id.* at 928.

22. *See id.* at 913 (describing the conformity pressures triggered through "groupthink"). The authors help explain groupthink with "social identity" research. *See id.* at 914–15.

23. *See id.* at 928–29.

24. *See id.* at 929.

25. *See id.* at 929–30.

26. THE WHO, *Won't Get Fooled Again*, *on* WHO'S NEXT (MCA Records 1971).

27. *See* Fanto et al., *supra* note 1, at 930 (describing any change in board social identity as "difficult to achieve").

28. *Id.*

29. *Id.* The full quotation reads:

> In addition, it is clear that the case for board diversity, as for diversity in other contexts, is based upon *normative frameworks other* than shareholder value (e.g.,

which is more a mechanism than a rhetoric or substantive justification. The point here would be to signal to "employees, customers, and the community that the firm is inclusive" and "signal the firm's compliance with the norms embodied in antidiscrimination laws."[31]

These sorts of justifications[32] have the benefit of avoiding any mismatch: they squarely raise the justice point. But, as the authors explicitly recognize, these arguments probably won't persuade board members much.[33] It's not as if diversity advocates don't already touch on themes of justice and fairness in making their case. But when push comes to shove, diversity advocates are skeptical that justice-based arguments will succeed in the boardroom. That is why they've gone after corporate self-interest. If they can at least make the business case plausible (even if not definitive), then through motivated reasoning and interest-convergence, perhaps boards might diversify themselves just a bit. And realistically, do diversity advocates ever expect anything more than incrementalism on this front?

CONCLUSION

For those who have studied diversity in the educational context, this conversation is familiar.[34] Diversity advocates in the college context pushed for affirmative action for social justice reasons that were continuous with ending de jure racial segregation. But the Supreme Court constrained the sorts of arguments that could be cognizable and focused narrowly on the pedagogical value of

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to redress past discrimination). . . . In our view, diversity advocates in the corporate context should base their advocacy upon *these frameworks*, just as the frameworks inspire antidiscrimination laws.

Id. (emphasis added).

30. *Id.* at 931.

31. *Id.*

32. A few other justifications are noted in passing: minorities and women might tolerate discrimination less; they could serve as role models; and they might have a symbolic value. *See id.* at 934. All three appear in two sentences just before the conclusion.

33. *See id.* at 904 ("[Diversity] advocates may feel compelled to make their arguments within this perspective of shareholder value because they understand it to be shared by public company board members, including members who are women and ethnic and racial minorities."); *id.* at 919 ("[Diversity advocates] no doubt realize that there are probably limits to how far generalized business justifications, which have no unassailable empirical support in shareholder value, will take them in financial and investment circles.").

34. For an insightful comparison of diversity discourse deployed in educational versus corporate contexts, see generally Sung Hui Kim, *The Diversity Double Standard*, 89 N.C. L. REV. 945 (2011).

diversity.[35] Accordingly, diversity advocates shifted tactics and focused on proving up that pedagogical case,[36] which incidentally has had greater empirical support[37] than the shareholder value claim. What's interesting is that commentators have warned against embracing the pedagogical justification for diversity—that such a rhetoric and justification was mismatched to the goal of promoting civil rights.[38]

As in that debate, the most important question is whether diversity advocates could and should have done otherwise, and what realistic alternatives are on the table. In civil rights work, there are always excruciating tradeoffs between transparent signaling of values versus close-to-the-vest, poll-tested framings; short-term versus long-term gains; standing your ground versus co-optation; winning the battle but losing the war; principle and pragmatism. In some ways, Fanto et al.'s analysis struggles through these very themes. But, in my view, too much remains submerged under the surface, without explicit articulation and defense of how and why they would make different and better trade-offs than the so-called "diversity advocates."

This Commentary is a critique of the Fanto et al. article, and it has remained faithful to the task of analyzing carefully their argument and performing an internal analysis. It has not, as some comments and reviews do, used the work as merely a springboard to opine on largely unrelated issues. If I were to give myself a little more leeway, I'd suggest an alternative—which can only be sketched out here. Besides shareholder value and groupthink, I'd emphasize more antidiscrimination by leveraging social scientific findings that discuss

35. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306–09 (1978) (rejecting past societal discrimination as a compelling interest).

36. *See* Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 677 (2004) ("[A]ffirmative action is increasingly being justified not as a remedy to historical discrimination and inequality, but as an instrumentally rational strategy used to achieve the positive effects of racial and gender diversity in modern society.").

37. *See* COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN HIGHER EDUCATION 131 (Mitchell J. Chang et al. eds., 2003) (analyzing the individual, institutional, and societal benefits of diversity in higher education and arguing that "[t]he most abundant research evidence supporting arguments for the continued use of affirmative action in college admissions exists in the area of how *individuals* benefit from diversity") (emphasis added).

38. *See* Gabriel J. Chin, Bakke *to the Wall: The Crisis of Bakkean Diversity*, 4 WM. & MARY BILL RTS. J. 881, 930 (1996) (suggesting that for some advocates of affirmative action "the diversity fig leaf exists as a pretext").

both structural impediments and *implicit biases*.[39] Many board members may not feel that it's their duty to take proactive action to counter structural problems that may throttle the number of racial minority and female board candidates. But many will feel obligated not to treat two people with identical merit (even traditionally defined) differently because of their social categories.[40] And that is what the implicit bias science now strongly suggests.[41] In other words, to increase board diversity, one could remind board members that they might be engaging unintentionally in "discrimination now"[42] and that they should check themselves and adopt what Mahzarin Banaji and I have called "fair measures."[43]

The larger strategy could look something like this. Diversity advocates should frame rhetorically the task as one of basic justice and fairness. They would add that increasing diversity doesn't *hurt* the bottom line (this is the weaker version of the business case for diversity).[44] And that even though all the board members are, of course, fair-and-square, implicit biases may be coloring their evaluations of candidates, at least on the margins. Thus, the board should adopt fair measures with an eye toward increasing board diversity. I assume that this approach would be a friendly amendment to the strategy recommended by Fanto et al. Indeed, they might think it to be merely a restatement. If so, we are all on the same page.

This overall strategy could make some incremental benefits to board diversity. It may be dissatisfying to many diversity advocates. Frankly, it should be. But again, for those who labor for social justice, the question has always been: "As compared to what?"

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39. For an introduction to the science, see Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497–1535 (2005); Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473–90 (2010).

40. *See* Jerry Kang & Mahzarin Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 CALIF. L. REV. 1063, 1082–86 (2006).

41. *See* Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: III. Meta-Analysis of Predictive Validity*, 97 J. PERSONALITY & SOC. PSYCHOL. 17, 19–20, 32 (2009) (completing a meta-analysis of 122 research reports, involving 14,900 subjects, that revealed predictive validity of the Implicit Association Test in domains including intergroup interactions).

42. *See* Kang & Banaji, *supra* note 40, at 1067–76.

43. *See id.* at 1066–67 (describing the use of "fair measures" in contrast to "affirmative action").

44. The authors fully realize this: "[D]iversity advocates do not need a failsafe empirical case for the benefits of board diversity in order to promote their cause; they just need to make persuasive, business-related arguments and have them adopted in board circles." Fanto et al., *supra* note 1, at 919.